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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-922

DOUGLAS HOWARD, Petitioner

v.

STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF CALIFORNIA

Richard S. Buckley
Public Defender of Los
Angeles County, California
Harold E. Shabo
Robert T. Jacobs

Herbert M. Barish
19-513 Criminal Courts Bldg.
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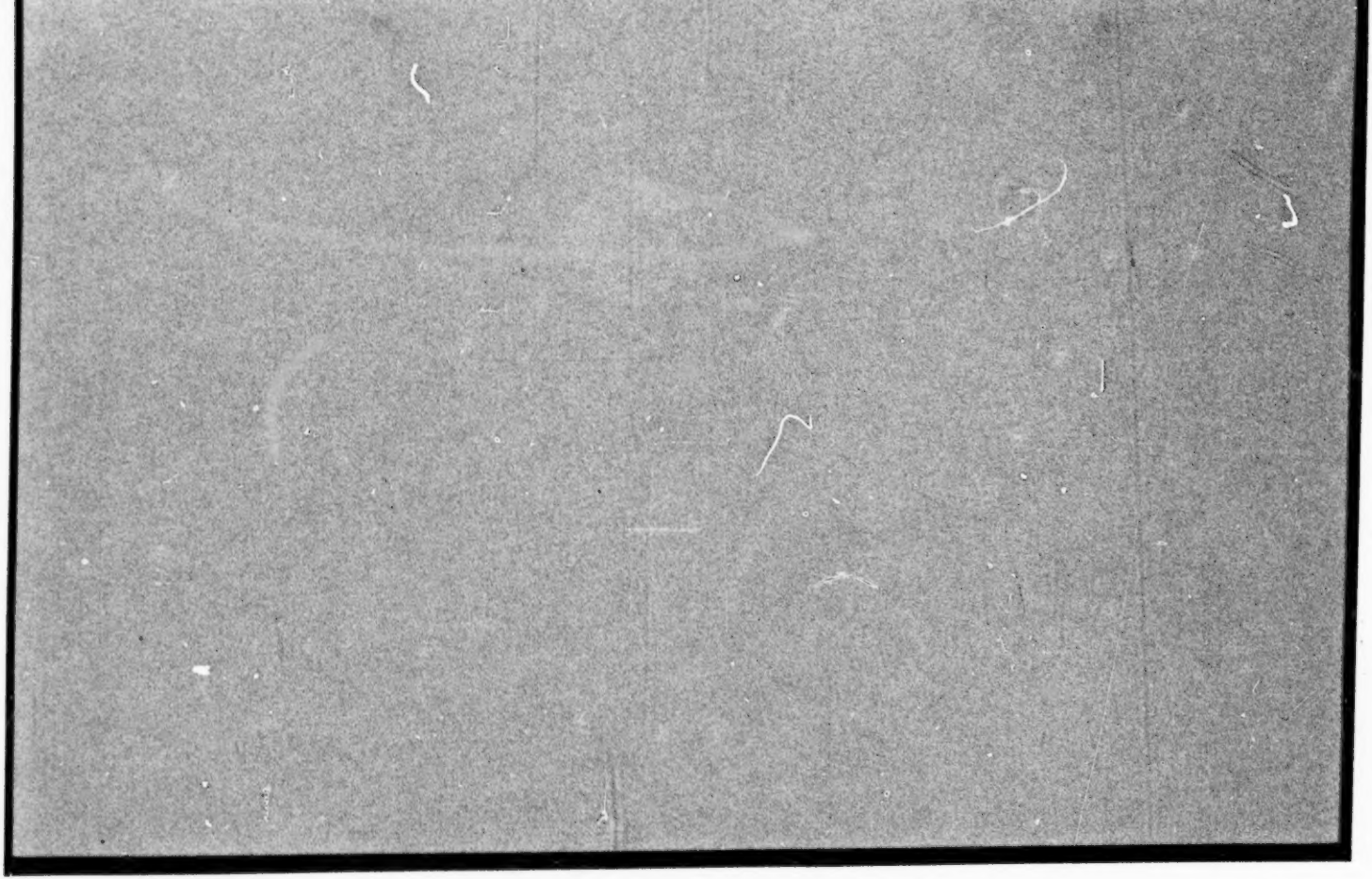

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No.

DOUGLAS HOWARD, Petitioner

v.

STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the Second Appellate District, Division One in the above cause on September 4, 1974, printed in Appendix A.

CITATIONS TO OPINIONS BELOW

The Court of Appeal of the State of California, Second Appellate District, Division One, issued an unpublished opinion, printed in Appendix A.

JURISDICTION

The decision of the Court of Appeals was made and entered as set forth in the quoted opinion under Appendix A on September 4, 1974, and the California Supreme Court denied hearing on October 30, 1974. The jurisdiction of this court is conferred by 28 U.S.C. section 1257(3).

QUESTION PRESENTED

Does the assessment of the cost of court appointed counsel against an indigent defendant violate his right to equal protection and due process as guaranteed by the Constitution of the United States of America when:

1. The defendant was acquitted.
2. Whether or not to assess costs is left to the caprice of the judge who heard the criminal case.

3. The amount of cost is determined in an arbitrary manner by the judge who presided over the criminal trial.

4. The right to a trial by jury as to the value of legal services is denied, while the non-indigent can contest before a jury the alleged value of his attorneys' services.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Fourteenth Amendment to the United States Constitution.

> Amendment XIV: ". . . nor shall any State deny any person of . . . property without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."

The statutory provision involved is California Penal Code section 987.8.

> Penal Code section 987.8. "In any case in which a defendant is furnished counsel, either through the public defender or private counsel appointed by the court,

upon conclusion of the criminal proceedings in the trial court, the court shall make a determination of the present ability of the defendant to pay all or a portion of the cost of counsel. If the court determines that the defendant has the present ability to pay all or part of the cost, it shall order him to pay the sum to the county in any installments and manner which it believes reasonable and compatible with his financial ability. Execution may be issued on the order in the same manner as on a judgment in a civil action. The order shall not be enforced by contempt.

STATEMENT OF THE CASE PROCEDURAL FACTS

On December 14, 1972, petitioner was arraigned in Los Angeles County Superior Court, case number A 284755, charging him with two counts of 245a Penal Code (assault with a deadly weapon) both

felonies. The Public Defender was appointed, a plea of not guilty was entered. The petitioner was informed of his responsibility to pay for appointed counsel.

On June 12, 1973, trial began. On June 14, 1973, the jury returned a verdict of not guilty to both counts. The court immediately assessed fees of $500 under 987.8 Penal Code.

On June 29, 1973, a notice of appeal was filed.

On November 14, 1973, petitioner filed his opening brief, the Federal constitutional questions raised in this petition were raised in that brief.

On August 27, 1974, oral argument was conducted in the Court of Appeal. The Deputy Attorney General representing the People of the State of California, conceded that assessing costs against Mr. Howard was improper.

On September 7, 1974, the Court of Appeal rendered its decision affirming the order of assessment.

On October 15, 1974, petitioner filed for hearing in the California Supreme Court.

On October 30, 1974, hearing was denied.

STATEMENT OF FACTS

The defendant was acquitted by a jury. After thanking the jurors for their service, the Honorable Paul G. Breckenridge, Jr. made the following statement to the jury:

> "I don't really see how you could have done much else in this case, considering the fact that the girl made the statement to the police out at UCLA that was probably false, at least in part.
>
> "I thought the defendant almost let the cat out of the bag on cross-examination when he started to tell you how he could stick that shotgun under his belt and get away with it. Let's hope that he doesn't do it again.
>
> "The juors are excused.
>
> "The defendant is not excused because we are going to have a

little hearing to see how much he has to pay the County for his legal services here."

The court then conducted a hearing as follows:

"THE COURT: Mr. Howard, you are entitled to have a hearing on the matter of the determination of what is an appropriate fee and your ability to reimburse the County for the 'costs of legal services.'

"Do you work?

"THE DEFENDANT: I'm not working at the present, but I was supposed to start after the trial is over.

"THE COURT: Where are you going to work?

"THE DEFENDANT: My brother is supposed to be trying to get me a job with the bus company.

"THE COURT: What bus company?

"THE DEFENDANT: The bus company on 54th and Arlington.

"THE COURT: Mr. Jacobs, how much time do you contemplate

that you have spent in this case and your investigation department?

"Do we have one of those orders, Rosie?

"MR. JACOBS: Our investigator indicates that they spent eight hours on the matter, and I would say that in addition to the trial time, I have spent three hours.

"THE COURT: All right. Well, I am going to find the defendant has the present ability to reimburse the County for the costs of legal services provided to him, and the Court feels that the costs are greatly in excess of $500, but I am going to fix $500 as the amount that the defendant is obligated to reimburse the County for the costs of legal services, and he can pay it off at $25 a month or more. The first payment will be August the 1st --

"MR. JACOBS: Excuse me, Your Honor.

"THE COURT: -- 1973.

"MR. JACOBS: Excuse me. Mr. Howard has asked -- I'm not sure where I fit in this particular situation. Mr. Howard has asked me to ask the Court if there is any sort of indication of how he can pay --

"THE COURT: He can get a job. It's about time he get off the dime and get a job.

"MR. JACOBS: At the present time he does not have one. He hopes to get one, but he doesn't have one at this time.

"THE COURT: I am giving him until August the 1st to raise $25. That's no big deal.

"All right. Pursuant to the appropriate section of the Penal Code, it is the order of this Court that Douglas Howard is ordered to pay the County of Los Angeles the sum of $500 for payment of services of appointed counsel, payable as follows:

"$25 per month or more, commencing on August 1st, 1973, and each succeeding 1st of each month thereafter until the entire sum shall be paid in full;

"Payments to be made to the Bureau of Resources and Collections, 155 West Washington Boulevard, Los Angeles.

"The defendant is present. He will be personally served with a copy of this order. He is to remain in courtroom until such time as he is excused by the clerk.

"That's all."

ARGUMENT

I. ASSESSING COSTS AGAINST AN ACQUITTED DEFENDANT DENIES DUE PROCESS OF LAW.

Petitioner contends that the process of the State extracting funds from an individual merely because he is charged with a crime constitutes a denial of due process of law. Enforcement of Penal Code section 987.8 results in the

taking of property (in the form of money) from indigents merely because they have been charged with a crime, regardless of guilt or innocence. If the power to tax involves the power to destroy, M'Culloch v. Maryland, 4 Wheat 316; certainly the power to levy costs involves both the power to destroy and the power to punish. Acquitted individuals such as the petitioner are, in effect, being punished for having been charged with a criminal offense. The presumption of innocence and the requirement that the state prove guilt prior to punishment being imposed is, thereby, abrogated.

> "In my opinion, the Due Process Clause of the Fourteenth Amendment does not permit a State to impose a penalty or costs upon a defendant whom the jury has found not guilty of any offense with which he has been charged." Giaccio v. State of Pennsylvania, 382 U.S. 399, 405; 15 L.Ed.2d 447, 452; 86 S.Ct.518, 522 (1966), (concurring opinion of Justice Fortas).

II. PETITIONER WAS NOT PROVIDED MINIMAL PROCEDURAL DUE PROCESS.

Minimal procedural due process requirements, such as expressed in Goldberg v. Kelly, 397 U.S.254, 25 L.Ed. 2d 287, 90 S.Ct.1011 (1970), were not provided petitioner.

The petitioner was not given timely and adequate notice as to what was to be presented at the hearing. The record indicates that the first information petitioner had as to what was to be presented at the "hearing," was what occurred at the proceeding itself.

There was no opportunity to examine witnesses.

Legal rules of evidence were not followed.

The judge did not state the reason for his determinations.

The judge did not indicate what evidence he relied upon to make his determinations.

The judge was clearly not an impartial decision maker. Firstly, the judge's income and conditions of work are affected by the governmental unit for

whom he is collecting funds and; secondly, in this case, the judge who heard the criminal action apparently believed the defendant was guilty of the charge despite the jury verdict. He stated to the jury, "I thought the defendant almost let the cat out of the bag on cross-examination . . . let's hope he doesn't do it again" (emphasis added). Such a statement clearly indicates a belief the defendant was getting off with committing a crime. The judge further stated, ". . . we're going to have a little hearing to see how much he has to pay the county for his legal services here" (emphasis added). It is clear from these statements that a judge, prejudiced against the defendant, was permitted to assess attorney's fees.

III. 987.8 OF THE PENAL CODE DENIES DUE PROCESS IN THAT IT IS OVERLY VAGUE.

No standards or guidelines are set for determining the ability of the accused to pay or for determining the

cost of counsel. Without standards, the statute should fall as did a Pennsylvania statute assessing court costs in criminal cases, Giacco v. State of Pennsylvania, supra. The problem with a lack of standards is clearly evident in petitioner's matter, where it is impossible to determine petitioner's present ability to pay or to understand what method was used to determine the value of legal services. The judge was permitted to exercise unfettered discretion.

IV. DENIAL OF THE RIGHT TO A TRIAL BY JURY DENIES EQUAL PROTECTION AND DUE PROCESS OF LAW.

In California, an attorney's client has a right to have a jury of his peers settle contested issues as to the value of services performed by the attorney and billed to the client, Cassel v. Gregori, 28 Cal.App.2d Supp.796 (1937). All persons have such a right except indigent defendants, People v. Amor, 12 Cal.3d 20 (1974). Indigents are

required to appear before a judge who is to determine the amount owed to the governmental body that effects the judge's salary and working conditions. There is, of course, no limit as to the amount the judge can assess.

None of the above issues were considered in Fuller v. Oregon, ___ U.S. ___, 40 L.Ed.2d 642, 94 S.Ct.2116 (1974).

CONCLUSION

For the foregoing reasons, petitioner prays that a Writ of Certiorari issue to review the decision of the California Court of Appeals in this case.

Respectfully submitted,

Herbert M. Barish

Herbert M. Barish

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DOUGLAS HOWARD, Defendant and Appellant.	2d Crim. No. 23974 (Super.Ct. No. A 289755)

APPEAL from a judgment (order setting fees under section 987.8 of the Penal Code) of the Superior Court of Los Angeles County. Paul G. Breckenridge, Jr., Judge. Affirmed.

Richard S. Buckley, Public Defender, and Harold E. Shabo, Robert T. Jacobs and Herbert M. Barish, Deputy Public Defenders, for Defendant and Appellant.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant

Attorney General, S. Clark Moore, Assistant Attorney General, and Howard J. Schwab and Russell Iungerich, Deputy Attorneys General, for Plaintiff and Respondent.

BACKGROUND

Defendant-appellant Douglas Howard (hereinafter HOWARD) was charged by information with two counts of assault with a deadly weapon in violation of Penal Code section 245, subdivision (a). An amendment to the information alleged that the defendant had previously been convicted of and served time in the state prison for violation of section 11530 of the Health and Safety Code.

At his arraignment on December 14, 1972, defendant HOWARD had a public defender appointed and the minute order of that date reflects: "Defendant is personally advised and put on notice of financial responsibility under 987.8 Penal Code."

The defendant pleaded not guilty and denied his prior.

Defendant HOWARD was acquitted by the jury on June 14, 1973. The minute order of that date contains the following: ". . . Defendant files waiver of hearing on determination of his present ability to reimburse the County for the costs of legal services provided. Court finds that the defendant has the present ability to reimburse the County in the amount of $500.00 payable $25.00 or more per month, commencing August 1, 1973. Order setting fees under Section 987.8 Penal Code is filed . . . ."

ISSUES

On appeal defendant HOWARD contends that section 987.8 of the Penal Code (1) places an unconstitutional burden on the right to counsel in criminal proceedings; (2) places an impermissible burden on the exercise of a defendant's right to a jury trial; (3) acts as a deterrent to effective representation by counsel; (4) requiring acquitted defendants to reimburse the county results in a denial of due process; (5) operates to deprive a defendant of

property without due process of law; (6) is unconstitutional on the ground it does not permit trial by jury on the issue of the amount owed; and (7) denies indigents equal protection of the laws.

DISCUSSION

All of the above issues have been held non-meritorious by the California Supreme Court in People v. Amor, 12 Cal.3d 20 [Cal.Rptr. , P.2d].

CONCLUSION

Order affirmed.

NOT FOR PUBLICATION

HANSON, J.

We concur:

WOOD, P.J.

THOMPSON, J.

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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-922

DOUGLAS HOWARD,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Five

BRIEF OF RESPONDENT IN OPPOSITION

Opinions Below

The opinions of the California Court of Appeal (App. A to the Petition) is unreported. The California Supreme Court's order denying a petition for hearing is also unreported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

Petitioner frames the questions as follows:

1. Does the recoupment of the reasonable value of the services of court-appointed counsel from an acquitted criminal defendant found not to be indigent at the conclusion of trial violate due process as guaranteed by the Fourteenth Amendment?

2. Is there a violation of due process under the Fourteenth Amendment if the decision on whether or not to assess costs of counsel services and the amount to be assessed is left to the caprice and arbitrary determination of the judge who heard the criminal case?

3. Does the absence of a right to trial by jury at the recoupment hearing involve a denial of due process or equal protection under the Fourteenth Amendment?

Constitutional Provisions Involved

United States Constitution, Amendment XIV, Section 1, in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statute Involved

California Penal Code Section 987.8 provides:

> "In any case in which a defendant is furnished counsel, either through the public defender or private counsel appointed by the court, upon the conclusion of the criminal proceedings in the trial court, the court shall make a determination of the present ability of the defendant to pay all or a portion of the cost of counsel. If the court determines that the defendant has the present ability to pay all or part of the cost, it shall order him to pay the sum to the county in any installments and manner which it believes reasonable and compatible with his financial ability. Execution may be issued on the order in the same manner as on a judgment in a civil action. The order shall not be enforced by contempt."

Statement of the Case

In an information filed by the Los Angeles County District Attorney, appellant was charged with two counts of assault with a deadly weapon in violation of Penal Code section 245(a). [Cl. Tr. pp. 1-2.] An amendment to the information alleged that appellant had been previously convicted in California of possession of marijuana in violation of Health and Safety Code section 11530, on or about December 31, 1964. [Cl. Tr. p. 3.]

The public defender was appointed to represent appellant. Appellant pleaded not guilty. Appellant was personally advised and put on notice of financial re-

sponsibility under Penal Code section 987.8. [Cl. Tr. p. 4.] Appellant denied the prior conviction. [Cl. Tr. p. 5.] A jury found appellant not guilty with respect to both counts charged in the information. [Cl. Tr. pp. 41-43.]

Appellant filed a waiver of hearing on the determination of his present ability to reimburse the county for the costs of legal services provided. [Cl. Tr. p. 43.] Nevertheless, the court advised appellant that he was entitled to have a hearing on the determination of what was an appropriate fee and on his ability to reimburse the county for the costs of legal services. Appellant stated that he was not working at the present time but that he was supposed to start work after his trial was over. His brother was trying to get him a job with the bus company on 54th and Arlington. [Rep. Tr. p. 4.] The public defender indicated that the investigator for his office has spent eight hours on this case and that he had spent three hours in preparation in addition to trial time. [Rep. Tr. p. 5, lines 2-4.] The trial apparently lasted at least one full day. [*See* Cl. Tr. pp. 11, 43.]

The court felt that appellant had the present ability to reimburse the County of Los Angeles for the cost of legal services provided to him. Although the court felt that the costs were greatly in excess of $500, he fixed $500 as the amount that appellant was obligated to reimburse the county for the costs of legal services. The court further ordered that appellant be permitted to pay

off this amount at $25 a month or more commencing on August 1, 1973. [Rep. Tr. pp. 5-6.]

Prior to the court's having made this order, the following colloquy took place between the court and defense counsel:

> "MR. JACOBS [Deputy Public Defender]: Excuse me. Mr. Howard has asked—I'm not sure where I fit in in this particular situation. Mr. Howard has asked me to ask the Court if there is any sort of indication of how he can pay—
>
> "THE COURT: He can get a job. It's about time he get off the dime and get a job.
>
> "MR. JACOBS: At the present time he does not have one. He hopes to get one, but he doesn't have one at this time.
>
> "THE COURT: I am giving him until August the 1st to raise $25. That's no big deal." [Rep. Tr. p. 5, lines 16-25.]

An appeal was taken from the recoupment order made pursuant to Penal Code section 987.8 in this action. [Cl. Tr. p. 46.] On appeal, the California Court of Appeal unanimously affirmed the recoupment order. Thereafter, on October 30, 1974, the California Supreme Court denied petitioner Howard's petition for a hearing in that court.

ARGUMENT

I

Recoupment of the Reasonable Value of Appointed Counsel Services From Non-Indigent, Acquitted Defendants Does Not Violate Due Process

Petitioner Howard contends that recoupment of the value of appointed counsel services from acquitted defendants violates due process because it imposes a penalty on a defendant found to be not guilty. (Petn., pp. 10-11.) While this Court's decision in *Fuller v. Oregon*, 417 U.S. 40 (1974), does not expressly approve the recoupment of the cost of appointed counsel from non-indigent, acquitted defendants, it clearly forecloses petitioner's argument that the recoupment is a penalty. Concluding that *Fuller* was fundamentally different from decisions "which have invalidated state and federal laws that placed a penalty on the exercise of a constitutional right" (417 U.S. at 54), this Court found that the Oregon statute did not impose a penalty but "merely provides that a convicted defendant who later becomes able to pay for his counsel may be required to do so." (*Id.*)

Respondent submits that the California Supreme Court gave a complete answer to petitioner's contention in the recent case of *People v. Amor*, 12 Cal.3d 20, 114 Cal.Rptr. 765, 523 P.2d 1173 (1974). There the Court stated:

> ". . . no *punishment* of acquitted defendants is authorized by section 987.8. Requiring that a de-

fendant, to the extent that he has the financial ability to do so, reimburse the county for services received does not constitute punishment by any definition ordinarily ascribed to such term. Furthermore, as hereinabove indicated, under the statute the burden of reimbursement is placed upon all indigent defendants according to their ability to pay, and there is no singling out of acquited defendants." (*Id.* at 28-29, 114 Cal. Rptr. at 770, 523 P.2d at 1178.)

II

The California Procedure for Determining Whether to Recoup and the Amount of Recoupment Satisfies Due Process

Petitioner Howard contends that the California recoupment statute permits arbitrary and capricious recoupment orders in violation of minimum due process under the Fourteenth Amendment. (Petn., pp. 3, 12-13.) This contention lacks substance in view of the recent *People v. Amor* decision handed down by the California Supreme Court. There California's highest court held that the requirements of notice and a hearing were to be implied from the due process clause even though California Penal Code section 987.8 did not expressly provide for notice and a hearing. *People v. Amor, supra,* 12 Cal.3d at 30, 114 Cal.Rptr. at 771, 523 P.2d 1179. Indeed, the Court went further and held that ". . . in addition, the rights to discovery, confrontation, cross-examination, and other procedural devices may likewise be implied." (*Id.*)

Furthermore, petitioner Howard is not in a position to object to the lack of a hearing with cross-examination of witnesses and legal rules of evidence (*see* Petn., p. 12) since the opinion of the California Court of Appeal cites that he filed "a waiver of hearing on determination of his present ability to reimburse the County for the costs of legal services provided." (Petn., p. 18.) Rather than presenting the broad due process issue which petitioner Howard urges upon the Court, the very most that this case presents is mere error by the trial court in its determination that petitioner had the ability to repay the County of Los Angeles for public defender services conferred upon him. In *People v. Kozden,* 36 Cal.App.3d 918, 921-22, 111 Cal.Rptr. 826, 827-28 (1974), the California Court of Appeal held that the defendant there lacked "present ability" to pay all or a portion of the cost of counsel where he owned no property and his total monthly income totaled $60 per month. At oral argument in the instant case, respondent conceded the applicability of the *Kozden* rule to petitioner Howard's case. The Court of Appeal affirmed the recoupment order despite this concession, possibly because the issue was not raised by petitioner Howard until he filed his reply brief. It is the general rule in California that matters presented for the first time in an appellant's closing or reply brief will not be considered by an appellate court. *Richard v. Richard,* 123 Cal.App.2d 900, 903, 267 P.2d 867, 868-69 (1954).

In any event, this case does not present an issue as to the constitutionality of the California standard for determining ability to pay at the conclusion of criminal proceedings. It raises only the narrow question of whether the court below misapplied the applicable California standard. Even if the California Court of Appeal decided this narrow question erroneously, respondent submits that the correction of mere error in this case does not present an important question for decision by this Court.

With respect to petitioner Howard's claim that the California standard of "present ability to repay" is vague (Petn., pp. 13-14), the *Kozden* case, *supra*, sets forth a clear standard. *See also People v. Amor, supra*, 12 Cal.3d at 30, 114 Cal.Rptr. at 771, 523 P. 2d at 1179.

III

Petitioner Howard Was Not Entitled to a Jury Trial on the Amount He Was Required to Repay

Petitioner Howard contends that he was entitled to a jury trial on the issue of the amount to be recouped. (Petn., pp. 14-15.) He may, however, have waived his right to jury trial in this civil proceeding by his waiver of hearing. (*See* Petn., p. 18.) Moreover, his right to jury trial under the Seventh Amendment to the United States Constitution is the right as it existed at common law at the time the Constitution was adopted. *Ross v. Bernhard*, 396 U.S. 531, 533 (1970). At that time, the common law did not provide for the awarding of

costs or attorney's fees to either party, and consequently there was no right to have a jury to assess counsel fees. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 372 (1851).

Conclusion

For the foregoing reasons, respondent urges that the petition for writ of certiorari be denied.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California,

JACK R. WINKLER,
Chief Assistant Attorney General—Criminal Division,

S. CLARK MOORE,
Assistant Attorney General,

FREDERICK R. MILLAR, JR.,
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Deputy Attorney General,
Attorneys for Respondent.